78-1347
No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN WALL and WALTER McAVOY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable: The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, John Wall and Walter McAvoy, pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals entered in this cause.

OPINION OF THE COURT BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit affirming the convictions of your petitioners is not officially reported, but is printed in the Appendix hereto (Appendix A).

JURISDICTION

The Opinion of the United States Court of Appeals for the Seventh Circuit was filed on December 11, 1978 (Appendix A). A Petition for Rehearing, timely made, was denied on February 6, 1979 (Appendix B). This Petition is filed within thirty days thereof. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Do the principles of the common law in light of reason and experience dictate the recognition of a federal common law speech and debate privilege to be applied in federal criminal proceedings involving elected State legislators?

2. Are "persons" a commodity or facility properly subject to regulation under the commerce clause, so that their independent movement from state to state may be utilized as the "affect"on commerce necessary to federal jurisdiction in, and operation of, Title 18 U.S.C. § 1951?

3. Is "extortion under color of official right" as used in Title 18 U.S.C. § 1951 properly interpreted as any bribery, any gratuity, or any other receipt of money (except salary) received by a public official?

CONSTITUTION, STATUTORY PROVISIONS AND RULES INVOLVED

Constitution of the United States, Article 1, Section 8, Clauses 3 and 18

Section 8, Clause 3. Regulation of commerce

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Section 8, Clause 18. Enactment of laws for execution of governmental powers

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Fourteenth Amendment - Constitution of the United States

AMENDMENT XIV. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 18, United States Code, Section 1951

§ 1951. *Interference with commerce by threats or violence*

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

Title 18, United States Code, Section 1952

§ 1952. *Interstate and foreign travel or transportation in aid of racketeering enterprises*

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. As amended Pub.L. 91-513, Title II, § 701(i) (2), Oct. 27, 1970, 84 Stat. 1282.

Rule 29, Federal Rules of Criminal Procedure

Rule 29. Motion for Judgment of Acquittal

(a) Motion before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of

acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury. As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 501, Federal Rules of Evidence

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules

prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the court of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933.

STATEMENT OF THE CASE

This case was begun by the filing of an indictment on May 15, 1975, charging the Petitioners John Wall and Walter McAvoy in a single count with a violation of Title 18, U.S.C. §1951, the Hobbs Act. In sum, it was alleged that during the period January 6, 1971, through January 9, 1973, the Petitioners, as members of the Illinois House of Representatives, did conspire, with each other and with diverse persons both known and unknown to the grand jury, to abuse their legislative powers and obligations, in that they would wrongfully use their aforementioned positions and the power and authority vested in them by reason of those positions to unlawfully obtain money which was not due them or their office and which money would be obtained from the Illinois Employment Association and certain named private employment agencies, as their officers, agents and employees with their consent, said consent being induced under color of official right. Along with the allegation of obtaining the money, it was alleged that they, the petitioners, would misrepresent, conceal, hide and

cause the same relative to the purposes and acts done in furtherance of the conspiracy.

Under paragraphs 4 through 9 of the Indictment (Doc. I) the jurisdiction of United States Courts is sought to be pleaded. It alleges some 10 named licensed private employment agencies were from January 1971 through February 1973 engaged in the business of securing or attempting to secure employment for persons or applicants seeking employment for employers in Illinois and outside of Illinois (para. 4); that such persons or applicants from within the state of Illinois moved and were to move in interstate commerce (para. 5); that such persons or applicants from within the state of Illinois moved or were to move in interstate commerce (para. 6); that the activities of the agencies was attempting to secure, or securing such employment for employers, who produced, manufactured, and sold goods, services, commodities and articles which moved and were to move in interstate commerce (para. 7); that some of said employment agencies were associated with and owned or were owned by companies engaged in the same business outside the state of Illinois (para. 8); that said agencies purchased and used facilities, goods, services, commodities and articles which moved or were to move in interstate commerce (para. 9).

Motions to dismiss the indictments on several grounds, including insufficiency and the proscriptions of Speech and Debate, were duly and timely made (Vol. I, Doc. 6; Vol. II, Doc. 6 and denied.

No evidence, testimonial or documentary, was introduced with reference to the commerce element. This was addressed entirely by stipulation.

Such stipulation provided that in the year 1971, four private employment agencies were licensed by the State of

Illinois Department of Labor; that each of the said employment agencies secured and attempted to secure and cause to be secured, employment outside the State of Illinois, for applicants and persons from within the State of Illinois, which applicants and persons moved and were to move in Interstate Commerce; that said employment agencies secured and attempted to secure and cause to be secured employments located within the State of Illinois for applicants and persons from outside the State of Illinois which applicants and persons moved and were to move in Interstate Commerce; that each of said employment agencies secured and attempted to secure and cause to be secured employments located within the State of Illinois and outside the State of Illinois and secured and attempted to secure and cause to be secured employees for employers within the State of Illinois and outside the State of Illinois which employers produced, manufactured and sold goods, services, commodities and articles which moved and were to move in Interstate Commerce; that each of the said employment agencies purchased and used facilities, goods, services, commodities and articles which moved and were to move in Inter tate Commerce. (Vol. I, Doc. 54).

The evidence presented at trial is concisely set forth in the Opinion (Appendix A). It is repeated here for convenience:

> "The defendants were both members of the Illinois House of Representatives during the time period covered by this indictment. Thomas Moran, who owned an employment agency and was president of the Illinois Employment Association (IEA), approached Gerald Wall, the son of defendant John Wall and the superintendent of the state agency which regulated private employment agencies, to discuss the possibility of legislative or administrative action which would

authorize the use of private employment agencies to place returning Viet Nam veterans in jobs at state expense. Gerald Wall indicated that new legislation would be required and offered to approach his father. There then followed a series of meetings and conversations between Moran and the defendants. (Although most of the contacts were with Wall only, there was ample evidence of McAvoy's involvement in the scheme and the overall sufficiency of the evidence against both defendants is not questioned in this appeal). There was evidence that a demand for money was made and agreed to and that repeated inquiries about the progress of the legislation were met with inquiries about the progress of Moran's fundraising attempts. Eventually $2,000 was raised from members of the IEA and paid to defendant Wall. The legislation eventually passed but was vetoed by the Governor and the additional money which had been demanded by the defendants was never paid." (Appendix A, p. 2-3).

Motions for Judgments of Acquittal were appropriately made as required by Rule 29 of the Federal Rules of Criminal Procedure, and denied, and the petitioners were sentenced to the custody of the Attorney General for respectively seven years and $5,000 fine (Wall), and five years subject to the provisions of Section 4205(2) (McAvoy). (Vol. 1, Doc. 64 and Vol. 2, Doc. 34)

Reciting the several bases on which appeal was sought, the Opinion of the Court below is again succinct, as set out in the Appendix. We repeat it here for convenience:

> "In February 1978 John Wall and Walter McAvoy were convicted by jury verdict of a single Hobbs Act violation. In this appeal they argue that the indictment and proofs failed to set forth a federal nexus of the crime, that the jury instruction on the elements of extortion was inadequate, that the government improperly bolstered, corroborated, and vouched for its

> witnesses, that a motion for severance should have been granted, and that this court's decision in *United States* v. *Craig,* 537 F.2d 957 (7th Cir. 1976) should be overruled." (Appendix A, p. 2).

On this Petition we address the federal nexus (interstate commerce), the jury instruction as it concerned commerce, which was endorsed by the Court below, and the speech and debate privilege.

REASONS FOR GRANTING THE WRIT

We respectfully request this Court to grant its Writ of Certiorari to review the judgment of the Court of Appeals in this case on the following grounds:

1. The question of whether these petitioners are entitled to a common-law speech and debate privilege against inquiry by the United States—or anyone else—into the activities and their underlying bases, when within the scope of State legislative activity has divided the Circuit Courts of Appeals,[1] and has not been, but we submit, should be, decided by this Court.[2]

The several Circuits give the preponderance in favor of the recognition of such a privilege,[3] though the Seventh

[1] *United States* v. *Craig*, 528 F.2d 773 (7 Cir., 1976), cert. den., 425 U.S. 973 (1976); *United States* v. *Craig*, 537 F.2d 957 (7 Cir., 1976), *en banc*, cert. den. *sub nom. Markert* v. *United States*, 429 U.S. 999; *United States* v. *DiCarlo*, 565 F.2d 802 (1 Cir., 1977), cert. den., 98 S.Ct. 404; *In re Grand Jury Proceedings*, 563 F.2d 577 (3 Cir., 1977), and the very recent decision in *United States* v. *Gillock*, 587 F.2d 284 (6 Cir. 1978), wherein we are advised the suggestion of the government for re-hearing *en banc* was denied in January of this year.

[2] Petitioner John Wall is the same John F. Wall named as petitioner in the matter lately filed in this Court on February 22, 1979 under No. 78-1302. After his conviction herein, he was subpoenaed as a Grand Jury witness and immunized. It was as an immunized witness that he invoked the privilege in that case.

[3] Facially, the Circuits appear 2-2. However, we do not consider the First Circuit inherently contrary. It is quite true that, in the First Circuit, in *United States* v. *DiCarlo*, 565 F.2d 802 (1st Cir., 1977), language may be found similar to the Seventh Circuit's pres-

(footnote continued)

Circuit persists in withholding it, notwithstanding it has been repeatedly requested to reconsider.

Though this Court has until now rejected several petitions of litigants to speak directly to the issue here presented, applicable decisions of this Court tend to indicate the privilege exists. First addressing the question in *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881), this Court directed broad application of the privilege. In *Kilbourn*, as well as in all civil rights cases involving state legislators, deference has been given the privilege. In *United States* v. *Brewster*, 408 U.S. 501 (1971), this Court quoted with approval from *Coffin* v. *Coffin*, 4 Mass. 1 (a state case) pro-

(footnote continued)

ent position, and certiorari sought by *DiCarlo* was denied. We submit that is far from determinative, since the Solicitor General resisted the grant on the basis that legislative conduct did not contribute to the guilty finding. The critical conduct, according to the government, occurred two months after the last legislative act:

> "As the court of appeals recognized, 'the crime itself was entirely outside of any legislative act' and the evidence of legislative conduct 'was introduced for its corroborative * * * effect' (Pet. App. 8a; footnote omitted). Indeed, the district court emphasized in its charge to the jury that it could convict petitioner DiCarlo only if it found beyond a reasonable doubt that he participated in the July 6, 1972, confrontation with McKee in New York (R. 1735-1737, 1744, 1754; Pet. App. 8a n. 6), and no assertion of legislative privilege could conceivably be made concerning this confrontation. The crime with which petitioner was charged was proven by evidence of non-legislative conduct, and the legislative action proved at trial simply explained the time and context of the illegal, non-legislative conduct. Because the issue whether there exists a testimonial legislative privilege therefore would not be dispositive in this case, the Court should not reach the question presented in the petition." Brief for United States in Opposition, *DiCarlo* v. *U.S.*, No. 77-990, pp. 7-8, 14-15.

hibiting inquiry. If the privilege applies, it provides protection in the broad sense directed in *Kilbourn* against actions in the criminal context, as well as the civil; against the Executive, as well as private individuals.

In this context, we further submit that this Court should inquire and define whether the Supremacy clause of the Constitution (Article 6, Clause 2) is ill applied in the area of co-existing sovereigns, where the concept of that co-existence is independence and equality—not supremacy.

We also submit that the privilege secured by 43 of the 50 states, including Illinois, the English Bill of Rights, the Articles of Confederation of the United States, as well as the Constitution itself as it concerns United States legislators is imposingly indicative of the historic significance of the question presented, and the importance of resolution in this contest between the legislative arm of the State as a sovereign and the executive component of the co-ordinate federal sovereignty.

If the privilege is operative under the common law of this country, its application to this case is manifest. The grand jury indictment charges that these petitioners "as members of the Illinois House of Representatives" did conspire "to abuse their legislative powers and obligations" through the use of their legislative positions "and the power and authority vested in them by reason of those positions" to obtain money. See indictment.

This Court has several times found the scope and extent of Speech and Debate proper to its consideration on the National level. In point of fact, we have no record of your ever rejecting their prayers. If the States are equal and co-extensive sovereigns, we submit these petitioners are equally entitled to like consideration.

2. The Seventh Circuit definition of "extortion under color of official right", as used in Title 18 U.S.C. § 1951 expressly endorsed in this case, is in distinct conflict with the Eighth Circuit decision with United States v. Rabbitt, 583 F.2d 1014 and the Sixth Circuit decisions in United States v. Adcock, 558 F.2d 397 and United States v. Shelton, 573 F.2d 917.

That positions of public officialdom are vulnerable is historically accepted. Nor do we contend they should not be so. It is the price of power and prestige. But—even public officials are entitled to a definition of the conduct to be avoided, if they are to escape the sanctions of the law. Thus, the federal statutes that delineate restrictions on public officials do just that (Title 18 U.S.C. § 201 (b)(c)(d) versus (f) and (g)). "Extortion under color of official right", if applied to *federal* public officials under § 1951 we can only assume must be something not encompassed in the definition of federal bribery (Title 18 U.S.C. § 201 (b)(c)(d)), and something other than unauthorized gratuities § 201 (f) and (g). Illinois also has its comparable bribery (Ch. 38, Section 33-1(d) and its gratuity (Ch. 127, Section 602-103), both Illinois Revised Statutes.

But—while a federal official would be prosecuted only for bribery, or even unauthorized gratuities, to the exclusion of "extortion under color of official right", the Seventh Circuit allows state officials to be convicted of the Hobbs Act "extortion under color of official right", if the act constitutes bribery or an unauthorized gratuity. Risking redundancy we emphasize that a federal official could not, and would not, risk conviction by the same standard as are adapted to these State officials. Equal protection of law rejects the concept.

Moreover, the next ensuing section of the Federal criminal Code (Title 18, U.S.C. §1952) prohibits the *use* of the facilities of interstate commerce to commit bribery. The Seventh Circuit interprets "extortion under color of official right" to be the equivalent of a bribery that merely *affects* commerce. Obviously, then, the strictures of §1952 are obliterated by the interpretation.

The definition given by way of instruction by the trial court, and endorsed by the Court of Appeals, of which we complain is:

> "Extortion under color of official right" means the obtaining of money by a public official through the wrongful use of his office, when the money obtained was not lawfully due and owing to him or to the office which he held. "Extortion under color of official right" does not require proof of specific acts by the public official demonstrating force, threat or the use of fear, so long as the victim consented because of the office or position held by the officer who obtained the money.
>
> I further instruct you that in considering whether "extortion under color of official right" was committed, it does not matter whether the public official induced the payments. If the public official knows that the motivation of the victim named in the indictment focused on the officer's official position and that money was obtained by the public official which was not lawfully due and owing to him or to the office which he held, that is sufficient to satisfy the requirements of the law of extortion under color of official right.
>
> Furthermore, that the transaction may also have constituted bribery is of no consequence in considering whether extortion under color of official right was committed.
>
> The same transaction may constitute bribery by the person paying the money and extortion under color of official right by the public official who receives it.

There are two alternatives. Either we must sue for a negating of §1951 as unconstitutionally vague, and the government must concede implied repeal of the "bribery" portion of §1952, or this Court must tell the Seventh Circuit that extortion is neither bribery, nor the acceptance of an unauthorized gratuity.

Not only because of conflict of circuits, but to insure federal-state equanimity, we urge that Illinois (and Wisconsin and Indiana) state officials be treated no differently by the federal laws than the other officials of forty-seven states as well as federal officials.

Other Circuits have found that the payments must be shown to have been made under some form of compulsion. *United States* v. *Rabbitt,* 583 F.2d 1014, 1026 (8 Cir., 1978); *United States* v. *Adcock,* 558 F.2d 397, 403-04 (6 Cir., 1977). Compare this Instruction which states: "It does not matter whether the public official induced the payments" (supra). The Sixth Circuit also specifically excludes the passive acceptance of a bribe. *United States* v. *Shelton,* 573 F.2d 917, 921 (6 Cir., 1978). Compare that part of the Instruction which states: "that the transaction may also have constituted bribery is of no consequence. . . ." (supra). There can be no question that the decision here authorizing such instruction conflicts with those cases. But also see the entirely exclusive portion of the definition which authorizes conviction for acceptance of a gratuity:

> "* * * If the public official knows that the motivation of the victim named in the indictment focused on the officer's official position and that money was obtained by the public official which was not lawfully due and owing to him or to the office which he held, that is sufficient to satisfy the requirements of the law of extortion under color of official right." (Part of Instruction quoted in the total above)

Whatever manner this Court considers the question sufficient to entertain—be it statute vagueness; unauthorized repeal of §1952; exercise of supervisory power or resolution of conflict of circuits—we urge it do so for the procession of charges and convictions is on-going and ever-increasing.

3. This Court, in its supervisory power, should define that "affect" on commerce, while pervasive, does not contemplate any peripheral, attenuated connection with commerce. To allow any connection to support federal jurisdiction under the commerce clause, invites complete federal invasion into the criminal aspect, and obliteration of federal-state balance.

This case was tried on a theory that job applicants, moving from state to state, were themselves a subject of commerce. Urgings were made on the Court below that such movement was not prone to regulation under the commerce clause under particular reliance on this Court's decision in *Edwards* v. *California,* 314 U.S. 164 (1941) where the right of people to move freely from state-to-state is a fundamental right under the Fourteenth Amendment[4] which insured "that mobility which is basic to any guarantee of freedom of opportunity" (314 U.S. at 181). The Court of Appeals elected not to address this question.

The next nexus (people travelling interstate to seek employment having been elided) was that potential employers of such people would, could or did engage in interstate commerce. The commerce clause does not deal with possibilities or probabilities. Once employed, the employment agency is out.

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[4] We have no question that the *transportation* of persons to effectuate that right, is a proper consideration and that the *transportation* may be regulated. Mr. Justice Douglas (314 U.S. at 177 et seq.) specially concurring, emphasized that a right of citizenship includes "the right to pass from state to state." That is not subject to regulation under the Commerce Clause.

The final "nexus" was that these service organizations,—having as their inventory equivalent people, which (or who) are not proper subjects of interstate commerce regulation, and dealing only in prospect of employment in interstate activities—used supplies, goods, facilities, commodities, articles and services, which moved or were to move in interstate commerce. If that is the scope of interstate commerce "affect", the federal government has just invaded every intimate aspect of home, communal and provincial life.

The reins and limitations of the Ninth and Tenth Amendments have been obliterated by the facilities of progress and convenience! The casual lifting of the telephone, the reaching for a facial tissue from Minnesota to suppress a sneeze, a choice of beef from Texas, or potatoes from Idaho for dinner, the snow-plow from Michigan to free from the house confines; the IBM machine; the Grand Rapids furniture. These do not make a business—nor a household—interstate. No more does an oriental rug put one in foreign commerce.

This case demonstrates an area of "commerce" extension, from which an admonition to retreat is imperative.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully prayed that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Edward J. Calihan, Jr.
Anna R. Lavin

Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued November 28, 1978)

December 11, 1978

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

Nos. 78-1586 and 78-1601

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN WALL and WALTER McAVOY,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 75-CR-322

GEORGE N. LEIGHTON, *Judge.*

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* Senior District Judge Robert A. Grant from the Northern District of Indiana, is sitting by designation.

ORDER

In February 1978 John Wall and Walter McAvoy were convicted by jury verdict of a single Hobbs Act violation. In this appeal they argue that the indictment and proofs failed to set forth a federal nexus of the crime, that the jury instruction on the elements of extortion was inadequate, that the government improperly bolstered, corroborated, and vouched for its witnesses, that a motion for severance should have been granted, and that this court's decision in *United States* v. *Craig,* 537 F.2d 957 (7th Cir. 1976) should be overruled. These arguments will be treated seriatim after a brief summary of the facts developed at trial. We find the objections to be without merit and affirm the convictions.

THE EVIDENCE

The defendants were both members of the Illinois House of Representatives during the time period covered by this indictment. Thomas Moran, who owned an employment agency and was president of the Illinois Employment Association (IEA), approached Gerald Wall, the son of defendant John Wall and the superintendent of the state agency which regulated private employment agencies, to discuss the possibility of legislative or administrative action which would authorize the use of private employment agencies to place returning Viet Nam veterans in jobs at state expense. Gerald Wall indicated that new legislation would be required and offered to approach his father. There then followed a series of meetings and conversations between Moran and the defendants. (Although most of the contacts were with Wall only, there was ample evidence of McAvoy's involvement in the scheme and the overall sufficiency of the evidence against both defendants is not

questioned in this appeal). There was evidence that a demand for money was made and agreed to and that repeated inquiries about the progress of the legislation were met with inquiries about the progress of Moran's fundraising attempts. Eventually $2,000 was raised from members of the IEA and paid to defendant Wall. The legislation eventually passed but was vetoed by the Governor and the additional money which had been demanded by the defendants was never paid.

THE FEDERAL NEXUS

The Hobbs Act (18 U.S.C. 1951) imposes criminal penalties on "whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by robbery or extortion or attempts or conspires so to do. . . ." The parties in this case entered into a stipulation, introduced into evidence at the trial, which indicated that at the time of the alleged extortion the employment agencies which provided the payoff assisted out-of-state residents in obtaining employment in Illinois and assisted Illinois residents in obtaining employment in other states; that the prospective employers produced, manufactured, and sold goods, services, commodities and articles which moved in interstate commerce; and that the employment agencies "purchased and used facilities, goods, services, commodities, and articles which moved or were to move in interstate commerce." The appellants argue that this stipulation does not satisfy the requirement of an effect on interstate commerce since the movement of people is not "commerce." We do not need to address this argument since it is clear that the stipulation satisfies the "depletion of assets" theory of *United States* v. *DeMet,* 486 F.2d 816 (7th Cir. 1973). The appellants concede that the evidence, taken in the light most favorable

to the government, shows that the assets of the employment agencies which contributed to the payoff were depleted and also that the arguably minimal scale of the depletion is not a factor in this appeal. They argue, however, that fairness should prevent the government from relying on this "later-born theory" when there is only speculation as to the nature of the "supplies" that may have come to the agencies through commerce (citing *United States* v. *Elders,* 569 F.2d 1020 (7th Cir. 1978)). We find the stipulation to be fully adequate in this regard. The defendants stipulated that the agencies purchased and used facilities, goods, services, commodities and articles which moved and were to move in interstate commerce. This was a stipulation, not the speculation of *Elders.* That stipulation was before the jury along with evidence that the assets of the agencies were depleted by the extortion. The evidence was therefore sufficient to meet the depletion of assets test (which the defendants do not challenge as such) and to establish the commerce element of the crime.

THE JURY CHARGE

The defendants contend that under the instructions given the jury conviction could rest on the defendants' acceptance of a mere gratuity rather than on proof of extortion. There was no objection to the instruction as given (and indeed no evidence suggesting that the payment was a mere gratuity). Our reading of the challenged instruction, which properly emphasized the obtaining of money through the wrongful use of the public official's office, leads us to the conclusion that it properly reflected our decisions in *United States* v. *Braasch,* 505 F.2d 139 (7th Cir.), *cert. denied,* 421 U.S. 910 (1975) and *United States* v. *Crowley,* 504 F.2d 992 (7th Cir. 1974).

PROSECUTORIAL VOUCHING AND CORROBORATION

The defendants point out that evidence was adduced that Mr. Moran had been given immunity when in fact he had not yet been given immunity (when the error was discovered a grant of immunity was made *nunc pro tunc* to the beginning of his testimony). We fail to see how the defendants were prejudiced by that testimony. There is a contention that the prosecutor improperly aroused sympathy for the witness by bringing out evidence (cited again in closing argument) that his application for a state license had been challenged while he was under a grant of immunity in a different case. Since the witness indicated that his business was able to continue, and indeed might be more lucrative without the state license than with it, the error in bringing out this testimony, if any, was harmless.

Mr. Moran was asked on re-direct if he had been repeatedly urged to tell the truth to the jury. He answered affirmatively. Although no objection was made to this testimony at trial, the defendants now attack it as "the most blatant example of self- and government-vouching we are ever likely to see." Having reviewed the transcript we conclude that the questions were proper rehabilitation of the witness.

The defendants also argue that the prosecutor improperly vouched for witness Moran during closing argument, saying on one occasion that "he had every motive to tell the truth and he told it" and on another occasion that "the people who paid the money . . . believed Moran and I think you should too." Urging the jury to believe a witness ordinarily does not constitute prosecutorial misconduct (*United States* v. *Verse,* 490 F.2d 280 (7th Cir.), *cert. denied,* 416 U.S. 989 (1974), and the remarks here certainly

do not approach the abuse of prosecutorial discretion condemned in *Berger* v. *United States,* 295 U.S. 78 (1935). In any event, since there was no objection to either remark when made, the objection has been waived.

CORROBORATIVE TESTIMONY OF OTHER WITNESSES

There was a continuing dispute in the court below as to the admissibility of testimony by persons other than Moran regarding what Moran had told them about his transactions with the defendants. The government argued before the trial court that the evidence was admissible as tending to show the victims' (including Moran's) state of mind or as statements of a co-conspirator (Moran) made during the course of the conspiracy. The government now relies primarily on the state-of-mind exception to the hearsay rule. We find the challenged evidence admissible for that reason. *United States* v. *Hyde,* 448 F.2d 815 (5th Cir.), *cert. denied,* 404 U.S. 1058 (1972). The jury was properly instructed to consider it only for that purpose. The prosecutor's reference to this testimony in closing argument has been discussed above.

SEVERANCE

At the close of the government's case defendant McAvoy moved for severance based on the anticipated testimony of Albert Dunne, who was to be called to the stand by defendant Wall. Given the late timing of the motion, despite the fact that McAvoy's counsel had been aware for some time that Dunne was going to testify, and the generally compatible nature of the two defenses, we do not find that the trial judge abused his discretion in denying the motion for severance.

LEGISLATIVE IMMUNITY

We are urged to reconsider our *en banc* holding in *United States* v. *Craig,* 537 F.2d 957 (7th Cir. 1976) that there is no federal common law privilege for state legislators that protects them against criminal liability. While we note that there is now some disagreement among the circuits as to the existence and extent of a privilege for state legislators, (See e.g., *United States* v. *Gillock,* ..... F.2d ....., 47 L.W. 2308 (1978)), we continue to adhere to our prior ruling.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 6, 1979

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

Nos. 78-1586 and 78-1601

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WALTER McAVOY and JOHN WALL,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 75-CR-322

GEORGE N. LEIGHTON, *Judge.*

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by counsel for the defendants-appellants, all of the judges on the original panel having voted to DENY a rehearing, accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

No. 78-1347

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN WALL AND WALTER MCAVOY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

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JOHN WALL AND WALTER MCAVOY, PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners contend (Pet. 12-14) that the government's introduction of evidence concerning petitioners' legislative acts in the Illinois legislature violated a common-law speech or debate privilege that should be recognized in federal courts under Fed. R. Evid. 501. Petitioners also claim (Pet. 15-19) that the trial court did not correctly instruct the jurors about extortion under color of official right, and that their conduct was insufficiently connected to interstate commerce to constitute a violation of the Hobbs Act, 18 U.S.C. 1951.

1. Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiring to extort money under color of official right, in violation of the Hobbs Act. Petitioner Wall received a sentence of seven years' imprisonment, and petitioner McAvoy

received a sentence of five years' imprisonment. In addition, each petitioner was fined $5,000. The court of appeals affirmed (Pet. App. 1-7).

The evidence at trial showed that in 1971 Thomas Moran, who was president of the Illinois Employment Association and an owner of an employment agency, met with Gerald Wall (petitioner Wall's son) to discuss the possibility of a state program of job placement for Vietnam veterans through private employment agencies (Tr. 75-89). Gerald Wall, then state superintendent of private employment agencies, informed Moran that such a program would require enabling legislation. Wall agreed, however, to introduce Moran to his father, who was a state legislator, to see if the necessary legislation could be passed (Tr. 89-91). Thereafter Moran conversed with petitioners on several occasions. In March 1971, petitioner Wall told Moran that "regardless of the merit of the bill * * * these things are expensive" (Tr. 96). He demanded $5,000 "to get things rolling * * * $2,000 for himself, $2,000 for McAvoy and $1,000 for the leadership" (Tr. 97). During the course of several further conversations between Moran and petitioner Wall, Wall pressed his demand for money. After petitioners introduced the agreed upon legislation in the Illinois House of Representatives and made further demands for payment, Moran directly paid Wall $2,000 in cash that had been raised by various IEA members (Pet. App. 2-3; Tr. 14-15, 164-165, 174-175, 195-202, 495-501).[1]

2. Petitioners contend (Pet. 12-14) that the introduction at trial of evidence concerning their legislative acts, such as the introduction of the veterans'

[1]The bill was ultimately vetoed by the governor, and the remainder of the $5,000 was never paid to petitioners.

employment bill, violated a common-law speech or debate privilege that should be recognized in federal courts under Fed. R. Evid. 501. The court of appeals adhered to its prior en banc decision in *United States* v. *Craig*, 537 F. 2d 957 (7th Cir.), cert. denied, 429 U.S. 999 (1976), which held that there is no common-law legislative privilege. The issue whether such a legislative privilege exists under Rule 501 in the context of a federal criminal prosecution is a substantial one. Because the courts of appeals have divided upon this important question, the government has petitioned this Court to resolve the conflict. See *United States* v. *Gillock*, petition for cert. pending, No. 78-1455.[2] Both *Gillock* and the instant case appear fairly to present this issue, and we believe that one or the other petition should be granted.[3] Since the issue is essentially the same in both cases, we see no benefit to the Court in granting both petitions.

3. Petitioners' other contentions do not merit consideration by this Court.

a. Petitioners claim (Pet. 15-18) that the trial court's instruction to the jury incorrectly equated extortion under color of official right with the mere acceptance of a gratuity. The basis of this claim is the court's

[2]A copy of the government's petition in *Gillock* has been sent to petitioner.

[3]We have not yet reviewed the trial transcript in its entirety, and it is therefore possible that the admission of legislative acts was harmless error in the circumstances of this case. We do not believe that this possibility precludes the Court from granting this petition to consider the speech or debate privilege question. If the government were ultimately to lose on the merits of the issue, it could present any harmless error contention to the court of appeals upon remand.

cryptic statement that "it does not matter whether the public official induced the payments" (Tr. 957-958). However, as the court of appeals noted (Pet. App. 4), petitioners failed to object to the charge, thereby waiving their claim. See Fed. R. Crim. P. 30.[4] Moreover, the charge as a whole correctly informed the jury that it could convict petitioners only if it found that petitioners had obtained money "through the wrongful use of [their] office," and that their "victim [had] consented [to pay] because of the office or position held by [petitioners]." Accord, *United States* v. *Rabbitt*, 583 F. 2d 1014, 1027 (8th Cir. 1978), cert. denied, No. 78-879 (Jan. 15, 1979); *United States* v. *Phillips*, 577 F. 2d 495, 501 (9th Cir. 1978), cert. denied, No. 77-1740 (Oct. 2, 1978); *United States* v. *Shelton*, 573 F. 2d 917, 921 (6th Cir. 1978), cert. denied, No. 77-1664 (Oct. 2, 1978); *United States* v. *Adcock*, 558 F. 2d 397, 403 (8th Cir.), cert. denied, 434 U S. 921 (1977).

b. Petitioners also contend (Pet. 18-19) that there was insufficient evidence of the nexus between their extortion and interstate commerce. This essentially factual claim was rejected by both courts below, as well as the jury, and further review by this Court is unwarranted. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). In any event, petitioners stipulated at trial that the employment agencies whose assets were depleted as a result of petitioners' extortion (a) assisted out-of-state individuals to find employment in Illinois, (b) assisted Illinois residents to find work in other states, (c) purchased services, goods, and materials that moved or were to move in interstate commerce, and (d) rendered services to employers

[4]The court of appeals further pointed out that there was "no evidence suggesting that the payment was a mere gratuity" (Pet. App. 4).

actively engaged in interstate commerce (Pet. App. 3-4; Tr. 554-556). Such facts clearly satisfied the minimal commerce nexus requirement found in the Hobbs Act. See, *e.g.*, *Stirone* v. *United States*, 361 U.S. 212, 215 (1960); *United States* v. *Rabbitt*, *supra*, 583 F. 2d at 1023; *United States* v. *Hathaway*, 534 F. 2d 386, 396-397 (1st Cir.), cert. denied, 429 U.S. 819 (1976); *United States* v. *Mazzei*, 521 F. 2d 639, 642 (3d Cir.) (en banc), cert. denied, 423 U.S. 1014 (1975).

We therefore do not oppose the granting of the petition for a writ of certiorari, limited to question one, but we respectfully submit that the petition should in all other respects be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979